Supreme Court of the United States

OCTOBER TERM, 1942

No. 535

PARAGON LAND CORP.,

Petitioner,

v.

JOSEPH P. DAY and BRADLEY DELEHANTY,
Trustees, etc.,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

GROSS & KECK,
Attorneys for Respondents,
16 Court Street,
Brooklyn, N. Y.

FREDERICK A. KECK,
Counsel for Respondents.

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TABLE OF CASES CITED

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(*References to the record appear in parentheses, giving the volume number in Roman numerals and page and folio numbers in Arabics.*)

Revised Statement

The manner in which petitioner incorporates in the statement that it had made a tender of performance and the repeated assertion that the reorganization trustees were attempting to sell property which they did not own (both questions of fact determined against petitioner by the State Courts), and the omission of vital facts, require presentation of a revised statement.

About 1931, Lannin Realty Company owned some 825 acres of land at East Meadow, Nassau County, N. Y., which it mortgaged for $600,000 to Title Guarantee and Trust Company and which thereupon sold participating interests in the mortgage to investors, such interests being represented by what were known as guaranteed mortgage certificates. Payment of principal and interest was guaranteed by Bond and Mortgage Guarantee Company under guarantee No. 171,038 (I, p. 9).

The Bond and Mortgage Guarantee Company, together with other mortgage guarantee companies, suffered by reason of the collapse of the real estate and mortgage market, and was taken over by the Superintendent of Insurance of the State of New York on August 2, 1933, for rehabilitation and later for liquidation, pursuant to the Insurance Law of the State of New York (I, p. 84).

The Legislature of the State of New York enacted what was called the Schackno Act (chap. 745, Laws of 1933), under which the Superintendent of Insurance was empowered to reorganize the guaranteed mortgage issues of such companies and the rights of the investors in mortgage certificates (Sec. 6 of Act). That law was sustained as constitutional (*Matter of People* (*Title & Mtge. Guar. Co.*), 264 N. Y. 69).

Under that law, the Superintendent instituted many reorganization proceedings in the Supreme Court of the State of New York, which court was given jurisdiction for that purpose under the so-called Schackno Act.

The customary procedure was for the court to appoint a trustee of the mortgage issue to take the same over from the Superintendent and then to make arrangements with the owner of the mortgaged property for modification of the mortgage, such as extending maturity, modifying the terms of the mortgage and similar matters all looking to the ultimate payment of the mortgage and

distribution of the moneys to the certificate holders. Where that could not be accomplished, the trustee was authorized to foreclose the mortgage, acquire title to the property and then endeavor to sell it so that the sale proceeds could be distributed to the certificate holders.

Later, the Legislature enacted the Mortgage Commission Act (chap. 19, Laws of 1935) which recited that the Superintendent of Insurance was not adequately equipped to handle the situation, and created the Mortgage Commission with a more adequate staff of help. The Supreme Court of the State of New York was again vested with jurisdiction of reorganization proceedings and such proceedings could thereafter be taken under either, or both, of such Acts (Sec. 4, subd. 15, Mtge. Com. Act). That law was also sustained as constitutional (*Matter of Mortgage Comm. (1175 Evergreen Ave.)*, 270 N. Y. 436, 1 N. E. 2d 838).

The Mortgage Commission thereupon promulgated a plan for the reorganization of the mortgage issue No. 171,038. The State Supreme Court approved the plan by order dated May 26, 1936 (I, p. 80).

By the order the court provided that having assumed jurisdiction of the reorganization proceeding, it would retain jurisdiction until the complete liquidation of the trust estate and the termination of the trust (I, p. 91).

The order appointed the respondents, Joseph P. Day and Bradley Delehanty trustees (together with Frederick R. Crane who has since died), and directed them to execute a Declaration of Trust in the usual form used in such proceedings.

It is not claimed that the order in this proceeding departed in any manner from the usual order in such reorganization proceedings.

The Declaration of Trust defined the trust estate as the certificated mortgage and any real property acquired

through foreclosure of the mortgage and provided that the trustees had no authority to sell the property constituting the trust estate without the permission of the court by order obtained in the reorganization proceeding after ten days' notice to the certificate holders (I, p. 78, f. 233).

It is not necessary to further detail the procedure in New York State mortgage reorganization proceedings, as this Court is quite familiar with it (*Marine Harbor Properties* v. *Manufacturers Trust Co.*, U. S. , decided November 9, 1942).

The trustees subsequently foreclosed the mortgage, acquired title to the mortgaged premises and then made efforts to sell the property. Various offers were received. The trustees thereupon applied to the court in the reorganization proceeding, upon notice to the certificate holders, for advice and direction as to such offers (I, p. 96, ff. 288, *et seq.*) During the pendency of that proceeding one Abraham Levingson, "attorney representing syndicate of purchasers," submitted an offer "on behalf of a syndicate represented by me," to purchase the property for $300,000 (I, p. 12, f. 35), of which $90,000 was to be paid in cash and the balance by purchase money mortgage.

Representations were made at a hearing in open court, that this syndicate had the facilities for developing the property and were financially able men (I, p. 95, f. 285).

The court thereupon decided that such offer was best for the certificate holders, in preference to one of the other offers (I, p. 12, f. 36), and directed the trustees to enter into a contract for the approval of the court.

Paragon Land Corp. was thereupon announced as the purchaser to be named in the contract, but the down payment had been made by the individual check of one of the syndicate (f. 35).

The contract, which was then prepared and signed, expressly provided that it was to be subject to the approval

of the court as required by the Declaration of Trust under which the trustees were acting (I, p. 40, f. 119).

The contract was approved by the court (I, p. 98) but the syndicate subsequently lacked part of the required cash (I, p. 25, f. 75) and Paragon Land Corp. failed to complete the contract (I, p. 28).

It then developed that Paragon Land Corp. was merely a "paper corporation," and that the incorporators were a stenographer in the office of Levingson and a stenographer and employee in the office of Morris Walzer, one of the syndicate members (I, p. 29, f. 85).

The trustees then presented the situation to the court by formal affidavits, in the reorganization proceeding (I, pp. 8, *et seq.*), and obtained an order from the Court directing Paragon Land Corp. to show cause why it should not be required to carry out and perform the contract and why it should not be decreed that the corporation was organized solely for the purpose of acting as the agency and instrumentality of the syndicate members Morris Walzer, Louis Weinstock and Harold J. Weinstock, why the corporate entity should not be disregarded so that the rights of the certificate holders would be protected, and why the syndicate members should not be required to furnish the funds for the completion of the purchase (I, p. 7).

The syndicate then sought to prevent a hearing by applying for a writ of prohibition against the court. That was denied (III, p. 5, f. 14). They then came into court and by formal application sought to have the aforesaid order to show cause vacated on the ground that the Justice had no power to sign the order. That was denied and, upon appeal, the ruling was unanimously affirmed (III, p. 5).

Eventually, the court made an order on August 6, 1940 (I, p. 4), directing the Paragon Land Corp. to complete the purchase and decreeing that the Paragon Land Corp.

was organized solely as the agency of the syndicate, that the syndicate members were the real parties in interest "who represented to the Court that they were acting through the corporation as a responsible and financially able purchaser," and directed the syndicate members to furnish the funds for the consummation of the purchase.

On appeal by the corporation and the syndicate members, the order was unanimously affirmed by the Appellate Division of the New York Supreme Court (I, p. 136).

The Court of Appeals of the State of New York allowed an appeal to that Court (I, p. 134).

The Court of Appeals affirmed the lower courts in so far as the Paragon Land Corp. was directed to complete the purchase upon the familiar principle that a purchaser at a sale made under the direction of the court and subject to the approval of the court, subjects himself to the jurisdiction of the court to compel completion of the purchase (III, p. 7), but reversed the lower courts in so far as they required the syndicate members to furnish the funds for completion of the sale.

Two Judges of the New York Court of Appeals were of the opinion that the summary jurisdiction of the court was properly invoked against the individual members of the syndicate on the ground that "the determination of the Special Term justice, who supervised this whole matter, that the individual defendants were the real contracting parties was amply justified by the evidence before him" (III, p. 10). However, the majority of the Court of Appeals voted to reverse the lower courts in so far as the individuals were concerned, on the ground that they were not being charged with contempt of Court or fraud upon the Court but rather with responsibility for the acts of the corporation, and that the syndicate members had in no manner become parties to the proceeding in which the court had jurisdiction under the statutes, saying, however, that perhaps in a formal action brought by the trustees

they may be able to show that the syndicate members had been guilty of fraud or that for other reasons the court should look behind the corporate entity and hold the syndicate members for the dereliction of the corporation (III, p. 8).

Thus any question with respect to due process under the Constitution was decided in favor of the syndicate members. The question with respect to compelling the corporation to complete the purchase involved no Constitutional question but merely a question of practice which has been the established practice from the earliest times.

ARGUMENT

I

Petitioner's contention that the trustees should have compelled performance of the contract of purchase by formal action for specific performance and not by available remedy in the reorganization proceeding, does not present any constitutional question.

Petitioner does not dispute the universal rule that a purchaser at a judicial sale, though not named as a party to the proceeding, submits himself to the jurisdiction of the Court in the proceeding in which the sale is made.

Cazet v. *Hubbell*, 36 N. Y. 677;
Hale v. *Clauson*, 60 N. Y. 339, 341.

Petitioner does not claim that any of the New York statutes set forth in the petition under "Statutes Involved" violate any provisions of the Constitution. It is merely claimed that the sale herein was not a judicial sale and that therefore the method of procedure should have been different from that which was followed.

The practically universal practice is to make application to the Court to compel the purchaser to complete his purchase as "a mere incident to the due exercise of the principal jurisdiction" (*Archer* v. *Archer,* 155 N. Y. 415). Such jurisdiction may be exercised "by petition or motion" in the original suit or proceeding. The purchaser acquires no rights "which may not be modified, controlled or directed, without any new proceeding directly against him" (*Archer* v. *Archer, supra*). Resort to an action for specific performance is not necessary (*Matter of Benedict,* 239 N. Y. 440, 446). The Court hears the application to compel completion on affidavits or may refer the matter to a referee, if necessary. "The rights of the parties can always be fully protected by the Court in directing when and upon what conditions further affidavits are to be read" (*Wanser* v. *De Nyse,* 188 N. Y. 378, 383).

Petitioner contends that the property was not *in custodia legis* and that therefore the sale was not a judicial sale.

There are many instances where the property is not in the actual custody of the court and yet a sale thereof is regarded as a judicial sale.

Trustees appointed by a will are, in some instances, required to petition the Court for leave ~~to~~ sell (N. Y. Real Property Law, secs. 105, 107). If the Court approves the transaction a final order is made empowering the trustee (and not a referee or special master), to carry out the transaction (id. sec. 107j).

A sale by an executor or administrator may be had for practically every purpose, including distribution of the estate (N. Y. Surrogate's Court Act, sec. 234). It must be authorized by the Court but no referee or special master is appointed to conduct the sale. The executor or administrator is directed to make the sale (id. sec. 238). Such sales are regarded as judicial sales (*Delaplaine* v. *Lawrence,* 3 N. Y. 301, 304; *Matter of Lynch,* 33 Hun 309).

Sales of real property of an infant or incompetent are not made at public auction. Application is made to the Court for leave to sell. The special guardian for the infant or the incompetent, or the committee for the incompetent enters into a contract of sale subject to the approval of the Court and then executes the deed to be given to the purchaser (New York Civil Practice Act, secs. 1393, 1394, 1396, 1397).

Completion of the purchase on such sales has been compelled by order in the proceeding, from earliest times, (*Brasher* v. *Cortland,* 2 Johns. Ch. 505), while, on the other hand, a purchaser upon such a sale may be relieved upon motion where good title cannot be conveyed (*Matter of Marino,* 215 App. Div. 841, 213 N. Y. Suppl. 680).

A receiver of the property of a corporation who has title "for the benefit of creditors and stockholders" (N. Y. General Corporation Law, sec. 168) may sell at public or private sale in such manner and on such terms as the Court may direct, and the receiver executes the conveyance (Gen. Corp. Law, sec. 169, subd. 2). A sale made through a contract by the receiver, although not at public auction, is a judicial sale (*People* v. *N. Y. Building-Loan Banking Co.,* 189 N. Y. 233).

A sale made by the New York Superintendent of Banks in liquidating a trust company is regarded as a judicial sale (*Matter of Supt. of Banks,* 207 N. Y. 11).

So also, while a general assignment for the benefit of creditors proceeds from the voluntary act of the assignor, the administration of the trust and the powers of the assignee are subject to the supervision and control of the court. By purchasing at a sale made by the assignee, the purchaser makes himself a party to the proceeding and subjects himself to the jurisdiction of the Court. The approval of the sale and the enforcement thereof, are mere incidents in the administration of the trust (*Matter of Sheldon,* 173 N. Y. 287).

It is not important, for the purposes of the question, whether the sale be public or private, only that it be made pursuant to the direction or authority of the Court. "It then has the character of a judicial sale" (*Matter of Dennison,* 114 N. Y. 621, 622).

It has been doubted, in the case of judicial sales, whether resort could be had to an action of specific performance. The remedy is to bring the defaulting purchaser before the Court by motion (*Przewozniczek* v. *Machowicz,* 123 Misc. 376, 205 N. Y. Suppl. 795).

II

Whether the sale is classified as a judicial sale or not, the Schackno Act and the Mortgage Commission Act conferred statutory jurisdiction upon the New York Supreme Court to pass upon every incident in a mortgage reorganization proceeding.

The sale was merely a step in the liquidation of the trust estate which the New York Supreme Court had within its jurisdiction until the complete liquidation of the trust estate and the termination of the trust (I, p. 91).

The Mortgage Commission, acting under the Schackno Act and the Mortgage Commission Act, instituted this proceeding for the approval of a plan promulgated for the reorganization of the rights of the certificate holders (I, p. 85, f. 255).

Section 1 of the Schackno Act shows the comprehensive purposes of reorganization proceedings. That section states that the mortgage corporations were not amenable to the Federal bankruptcy laws and that the holders of mortgage investments (participation certificates, sec. 2 of the Act), could not avail themselves of the composition provisions of such bankruptcy laws for the settlement of their claims against the mortgage companies in respect of

guaranties undertaken by them and that therefore it is "essential for the public interest to provide a procedure under which" the mortgages and other security "may be liquidated."

Section 10 of the Mortgage Commission Act expressly provides for the appointment of trustees to take over the mortgage security. By section 11, the New York Supreme Court is given jurisdiction to approve, modify or disapprove the plan. The Presiding Justice of each Appellate Division of the New York Supreme Court was authorized to fix the time and place for holding special terms for the hearing "and determination of reorganization proceedings" and any Justice so assigned was vested with very broad powers "in the supervision of such trusts" (sec. 17a, Mortgage Commission Act).

The plan having been promulgated under both Acts, it obviously involved the "readjustment or liquidation" of the mortgage security as provided in section 18 of the Mortgage Commission Act.

The purpose of those two Acts was to provide for the reorganization of certificated mortgage issues so that trustees could administer the underlying mortgages for the benefit of the certificate holders as a class (*Mittlemann* v. *President & Directors of Manhattan Co.*, 248 App. Div. 79, 289 N. Y. Suppl. 2, aff'd. no op. 272 N. Y. 632; *Weil* v. *same*, 275 N. Y. 238).

The principle is thoroughly established and accepted that "by virtue of the order (of rehabilitation) and Article 11 of the (New York) Insurance Law the Superintendent (of Insurance) became in effect a receiver under the supervision of the State court, and the property under his control became *in custodia legis*" (*Jacoby* v. *Bond and Mortgage Guarantee Co.*, 72 Fed. 2d 420, cert. den. 293 U. S. 619; *Tolfree* v. *N. Y. Title and Mortgage Co.*, 72 Fed. 2d 702, cert. den. 293 U. S. 619).

Here the trustees were not acting as trustees of a private trust as if they were merely acting as trustees under a mortgage indenture, or as a successor of such trustee appointed by the court as in the case cited by petitioner (*Commonwealth Co.* v. *Bradford,* 297 U. S. 613). The trustees were not appointed as successors to Title Guarantee and Trust Company, which was named as mortgagee in the mortgage. The trustees were appointed by the Court in the reorganization proceeding to succeed the Superindendent of Insurance in managing and ultimately liquidating a trust estate created under the emergency statutes (*Schackno Act and Mortgage Commission Act, supra*). Such a trust or receivership is not a private trust. A receivership continues until its object is achieved and does not terminate by change in personnel during its administration (*McNulta* v. *Lochridge,* 141 U. S. 327, 332).

A trust under the Schackno Act "is one public in its nature, undertaken primarily for the protection of mortgage certificate holders, where the court, under the statute (Schackno Act) passed in the emergency caused by the financial depression, is undertaking to direct the administration of the trust through its agents, first the Superintendent of Insurance and later the trustees under the plan. Fundamentally it is still a statutory receivership with change in method for the reason that the office of the Superintendent of Insurance was not equipped to handle the affairs of so many corporations of the same type that had come into his hands. Therefore, in this case, another agency of administration was selected; but this agency, like the Superintendent of Insurance, was at all times under the direction of the court * * *."

> *Hurdman* v. *Kelly,* 254 App. Div. 368, 5 N. Y. Suppl. 2d 378.

When a plan of reorganization is approved, that does not end the functions or jurisdiction of the Court. "There-

upon'' such steps are to be taken by the Superintendent of Insurance and all other parties and all acts are to be done which may be required by the plan or which may be necessary or desirable for the consummation of the plan (subd. 3, sec. 6, Schackno Act) and provision is made for the payment of the expenses of the plan ''from the commencement of the proceeding until the final consummation thereof'' (subd. 4, same section).

The intention plainly was to conform the State procedure, as much as possible, to that in Federal reorganizations, where the custom is that the Judge who entertains the original petition for reorganization usually retains the case until completion so that it may not be necessary to acquaint each Judge at a succeeding term with the proceedings already had.

The plain intent of the New York statutes would be frustrated if it were held that each time some order or direction became necessary in the reorganization proceeding, a separate and independent formal action had to be instituted. There were thousands of such proceedings. If separate independent actions were necessary to enforce accomplishment of ultimate liquidation, this, and perhaps the next, generation will not see the end.

III

The Constitution does not undertake to control State Court methods of procedure.

''The Fourteenth Amendment does not control the power of a State to determine the form of procedure by which legal rights may be ascertained, if the method adopted gives reasonable notice and affords a fair opportunity to be heard'' (*Hooker* v. *Los Angeles*, 188 U. S. 314, 318).

There is no need to discuss the authorities cited by petitioner, such as *Morgan* v. *U. S.* (298 U. S. 468) where

the grievance was that plaintiff had not been given the hearing which a statute required. It was not a question of a "particular type of procedure" (p. 478).

The order to show cause and the affidavits upon which the application was made in this reorganization proceeding to compel completion of the purchase, served the same purpose as a summons and complaint (*Matter of Young,* 66 Misc. 216, 122 N. Y. Suppl. 1116).

Under the New York practice, the provisions of law relating to the mode of personal service of a summons apply to the service of any process whereby a special proceeding is commenced except contempt proceedings, which this is not, or unless special modes of service are prescribed by law (Rule 21, N. Y. Rules of Civ. Pr.). None such is claimed.

The respondents were thereupon deemed to be plaintiffs and the petitioner was deemed to be a defendant (N. Y. Civil Practice Act, sec. 191).

This Court does not undertake to determine whether the procedure in a State court was in accordance with the State law. The final judgment of the State court determines that it was (*United Gas Co.* v. *Texas,* 303 U. S. 123).

Petitioner does not claim that it was deprived of any right of trial by jury. The claim is that petitioner should have been brought into Court by a piece of paper,—a summons in an independent equity action for specific performance where no right to a jury trial existed, rather than by another piece of paper,—an order to show cause issued by the Court in the pending reorganization proceeding.

Petitioner does not claim that adequate notice had not been given to it of the proceeding to compel completion of the purchase.

Petitioner was personally served (I, p. 70, f. 209) with the affidavits and other documents and with the order

directing it to show cause why it should not be required to complete its purchase. That constituted due process.

> "* * * It is apparent that this defense merely asserted that the rights of the corporation as a citizen of the United States would be impaired by enforcing the claim urged against it on the motion, instead of by another and less summary form of action. But it is clear that the Fourteenth Amendment in no way undertakes to control the power of a State to determine by what process legal rights may be asserted or legal obligations be enforced, provided the method of procedure adopted for these purposes gives reasonable notice and affords fair opportunity to be heard before the issues are decided. This being the case, it was obviously not a right, privilege or immunity of a citizen of the United States to have a controversy in the state court prosecuted or determined by one form of action instead of another. It is also equally evident, provided the form sanctioned by the state law gives notice and affords an opportunity to be heard, that the mere question of whether it was by a motion or ordinary action in no way rendered the proceeding not due process of law within the constitutional meaning of those words * * *."

Iowa Central R. Co. v. *Iowa,* 160 U. S. 389; *Cincinnati St. Ry.* v. *Snell,* 193 U. S. 30.

Not only was the petitioner afforded an opportunity to be heard, but it was actually heard on the merits. Petitioner asserted in the State courts (I, p. 104), and still urges in this Court, that the trustees did not own the property affected by the sale, that it was owned by the County of Nassau and that the trustees could not convey title.

Tax liens affecting all of the property had been sold prior to the appointment of the trustees (I, p. 10, f. 30). When the purchaser of the tax liens—the County of Nassau—threatened to take title to the property by virtue of the tax liens, the trustees brought suit to enjoin the county from so doing. While that suit was pending, the county

nevertheless took deeds (I, p. 11). This the county had no legal right to do (*Bonded Municipal Corp.* v. *Carodix Corp.*, N. Y. Law Journal, August 1, 1942, p. 257; *Matter of Munson*, 11 Fed. Supp. 564). Additional authorities on this feature need not be cited, because the County of Nassau entered into a written stipulation with the trustees to reconvey the property to the trustees and the trustees agreed to discontinue the action which they had brought to enjoin the delivery of the so-called tax deeds (I, p. 61). All this was presented in the State court and approved (I, p. 98, f. 293). The order of the State Supreme Court directing petitioner to complete the purchase (I, p. 5) necessarily involved a finding that the trustees had title. That order was affirmed by the Appellate Division of the New York Supreme Court (I, p. 135) and by the New York Court of Appeals (III, p. 12). Such determination upon the facts is not reviewable here.

Petitioner further contended, on the merits, that it had made a tender of the balance of the purchase price and that the trustees failed to deliver the required conveyance of the property to it.

The facts in this respect were also presented by the petitioner to the State courts (I, p. 104). Two days before the time set for the completion of the purchase, petitioner's then attorney reported that the syndicate members lacked part of the necessary cash to complete the purchase. Additional time was requested (I, p. 25, f. 75). When all parties met at the time agreed for the purpose, petitioner was not ready to fulfill the contract (I, p. 26, ff. 77, 78). All of the trustees were present and the deed was ready for execution as were also the mortgages which the petitioner was to execute. After all of the trustees had left, and late in the day, the syndicate members returned and offered checks totalling $75,000. They were not the checks of the petitioner corporation but of one of the individuals composing the syndicate. The parties would not commit

themselves as to whether they were really making a tender or were offering the checks merely so that it could not be said they were in default (I, p. 27, ff. 79, 80, p. 75, f. 224). The trustees not being present (I, p. 74) naturally their deed could not be delivered. The amount of the mortgage which was to be delivered by the petitioner was not even computed (I, p. 75, f. 223). In any event, further time to complete the purchase was given to the petitioner and subsequent negotiations were conducted by them apparently for the purpose of raising the additional funds which one of the syndicate members (I, p. 76, f. 228) had failed to supply (I, pp. 28, 76). Subsequently, the attorney for the purchaser announced that the additional cash had not been raised, that the transaction could not be consummated and that no formal tender of the trustees' deed was necessary (I, p. 76, f. 227). The thin pretence was presented to the courts below that when the attorney for petitioner attended at the adjourned time for closing title and when he participated in the subsequent transactions looking toward completion of the purchase, he was no longer acting for petitioner but really as a kindness to the attorney for the trustees (I, p. 117, f. 351). When the State Supreme Court directed completion of the purchase, there was necessarily implied a finding that the court did not regard that petitioner had made any legal tender. Indeed, petitioner could have taken title at any time had it desired to do so. It did not even take title when the court directed it to do so. The New York Court of Appeals specifically found that petitioner was at fault in not completing the purchase (III, p. 6, f. 17). This determination upon the facts is likewise not reviewable here.

After the State Supreme Court had directed petitioner to complete the purchase, petitioner applied to that court for a re-hearing. On that application it attacked the validity of the reorganization proceeding, claiming that the plan of reorganization had not been consented to by the number of certificate holders required by the statute. The

application was denied by order entered October 18, 1940, and petitioner appealed to the Appellate Division of the New York Supreme Court (I, p. 136, f. 137) where the ruling of the lower court was unanimously sustained (*Matter of Bond & Mortgage Guar. Co.*, 262 App. Div. 857, no op.). The order of the Appellate Division (I, p. 136), recites this application for rehearing and affirms the denial thereof. None of the papers on such application for rehearing have been printed in the record presented to this Court, presumably on the theory that petitioner had not asked for any review of that ruling by the New York Court of Appeals. It would seem to us that the papers on the application for rehearing should have been included in the record in this Court.

Petitioner not only had due notice of the original application to compel completion of the purchase and therein presented its contentions on the merits by asserting that the trustees did not have any title and that petitioner had made a tender and was not in default, but itself invoked the jurisdiction of the State Supreme Court when petitioner applied for a rehearing. Petitioner should not now be heard to say that all this was merely a joke. (*McDonald* v. *Oregon R. & N. Co.*, 233 U. S. 665).

CONCLUSION

Petitioner has not shown any ground recognized by this court as the basis for a writ of certiorari and its petition should be denied.

December, 1942.

Respectfully submitted,

Gross & Keck,
Attorneys for Respondents.

Frederick A. Keck,
Cousel for Respondents.